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Public Prosecutor v Mohd Abdul Aziz bin Ibrahim

HIGH COURT (KUALA LUMPUR) — TRIAL NO 45B-42.10 OF 2012
AMELIA TEE ABDULLAH J
7 JUNE 2013

Criminal Law — Penal Code — Murder — Public brawl led to murder — Deceased stabbed on neck with sharp object — Penetrating wound would have been caused by a pointed, narrow and penetrating object — Scissors found in accused's trouser's pocket — Whether scissors were murder weapon — Whether CCTV recordings revealed accused stabbing deceased in neck — Whether corroborated testimony of eyewitness who did not see stabbing — Whether prima facie case proven — Whether accused should be called to enter defence — Penal Code s 302

The accused was charged for murder, an offence under s 302 of the Penal Code ('the Code'). PW8 from cawangan kereta peronda was on rounds when he saw a group of people gathering by the side of Pudu Sentral. Upon approaching the group of people, he saw a man ('the deceased') of indeterminate race lying on the road, seriously injured and covered with blood. Next to the deceased was a man squatting ('the accused'). He arrested the accused based on information received from the public that the accused was involved in a fight with the deceased. The clothes and slippers of the accused were bloodied and a search on the accused's body revealed a pair of scissors in his right trouser's pocket. Initial investigations revealed that there was a fight in Restoran Shukran which was located about 50 meters from where the deceased had subsequently collapsed. The police requested to view the CCTV recording in the restaurant which captured the fight between the deceased and the accused. Evidence was led that the CCTV recording could be seen from three cameras, namely cameras 3, 4 and 6. Camera 4 was located at the front entrance of the restaurant and recorded the accused entering and leaving the restaurant. Camera 3 was located inside the restaurant and recorded the movements of the deceased retreating and the accused advancing and swinging his hands towards the deceased. Camera 6 was also situated in the restaurant and recorded the act of the accused in stabbing at the neck of the deceased. A post mortem by the pathologist ('PW9') disclosed that the penetrating wound would have been caused by a pointed, narrow and penetrating object such as a screwdriver, a piece of wood or metal with a pointed end. The prosecution had called an employee of Restoran Shukran who was present in the restaurant at the time of the incident ('PW6'), who testified seeing three men fighting from the outside of the restaurant and into the restaurant. However, PW6 did not notice the men using any object when they were hitting each other. It was only after they had gone out of the restaurant that he noticed that there was blood on the floor of

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the restaurant. There was no blood on the floor before the fight. He did not know where the blood had come from and he did not see who was injured.

Held, acquitting and discharging the accused without calling the accused to enter defence:

(1) The prosecution's case rested primarily on the CCTV recording from Restoran Shukran. The court did not say that in an appropriate case where a CCTV recording clearly captured the commission of an offence and the identity of the perpetrator could clearly be identified, that there could not be a finding of a prima facie case based solely on a CCTV recording. However, it cannot be gainsaid that the evidence of such CCTV recording must be admissible in the first place (see para 63).

(2) At the close of the prosecution case, after considering the totality of the evidence adduced, the court has to ask itself this question: if I call on the accused to enter upon his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence adduced by the prosecution? The court was of the considered view that without the evidence of the CCTV recording, the answer to the question was a loud and resounding no (see para 65).

(3) The prosecution failed to make out a prima facie case against the accused on the charge of murder under s 302 of the Code which if unrebutted or unexplained, would have warranted his conviction. Without the evidence of the CCTV recording, the court was also unable to find a prima facie case made out on any lesser charge (see para 66).

[Bahasa Malaysia summary

Tertuduh didakwa membunuh, kesalahan di bawah s 302 Kanun Keseksaan. PW8 daripada cawangan kereta peronda sedang melakukan rondaan ketika dia melihat sekumpulan orang berkumpul di tepi Pudu Sentral. Sewaktu menghampiri sekumpulan orang itu, dia melihat seorang lelaki (si mati) yang tidak dapat dipastikan bangsanya terbaring di atas jalan, cedera teruk dan berlumuran darah. Di sebelah si mati terdapat seorang lelaki yang mencangkung (tertuduh). Dia menahan tertuduh berdasarkan maklumat yang diperolehi daripada orang awam bahawa tertuduh telah terlibat dalam pergaduhan dengan si mati. Pakaian dan selipar tertuduh dipenuhi darah dan pemeriksaan atas badan tertuduh mendedahkan sepasang gunting di dalam poket kanan seluarnya. Siasatan awal mendedahkan bahawa terdapat pergaduhan di Restoran Shukran yang terletak kira-kira 50 meter dari mana si mati telah jatuh. Polis meminta untuk melihat rakaman CCTV di dalam restoran yang merakamkan pergaduhan antara si mati dan tertuduh. Bukti menunjukkan bahawa rakaman CCTV dapat dilihat dari tiga kamera, iaitu kamera 3, 4 dan 6. Kamera 4 terletak pada pintu masuk hadapan restoran yang merakam tertuduh memasuki dan meninggalkan restoran. Kamera 3 terletak

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di dalam restoran dan merakamkan pergerakan si mati berundur dan tertuduh maju ke hadapan dan menghayunkan tangannya ke arah si mati. Kamera 6 juga terletak di dalam restoran dan merakamkan tindakan tertuduh menikam tengkuk si mati. Post mortem oleh ahli patologi (PW9) mendedahkan bahawa luka yang menembusi hanya boleh disebabkan oleh objek runcing, kecil dan boleh menembusi seperti pemutar skrew, sekeping kayu atau logam dengan hujung yang tajam. Pihak pendakwaan telah memanggil pekerja Restauran Shukran yang ada di dalam restoran pada masa kejadian (PW6), yang memberi keterangan melihat tiga orang lelaki bergaduh dari luar restoran dan di dalam restauran. Tetapi, PW6, tidak melihat lelaki-lelaki itu menggunakan sebarang objek apabila mereka memukul satu sama lain. Hanya selepas mereka keluar dari restauran dia perasan bahawa terdapat darah pada lantai restoran. Tidak ada darah pada lantai restoran sebelum pergaduhan. Dia tidak mengetahui dari mana darah itu datang dan dia tidak melihat siapa yang tercedera.

Diputuskan, membebaskan dan melepaskan tertuduh tanpa memanggil tertuduh untuk memasukkan pembelaan:

(1) Kes pendakwaan terletak terutama sekali pada rakaman CCTV dari Restoran Shukran. Mahkamah tidak menyatakan bahawa dalam kes yang wajar di mana rakaman CCTV dengan jelas merakamkan pelakuan satu kesalahan dan identiti pelaku boleh dikenal pasti dengan jelas, bahawa tidak boleh menjadi dapatan kes prima facie berdasarkan semata-mata kepada rakaman CCTV. Namun, tidak dapat disangkal bahawa bukti sesuatu rakaman CCTV hendaklah diterima pada permulaannya (lihat perenggan 63).

(2) Pada penutup kes pendakwaan, selepas mempertimbangkan keseluruhan keterangan yang dikemukakan, mahkamah perlu mengambil kira soalan ini: jika saya memanggil tertuduh untuk memasukkan pembelaannya dan dia memilih untuk berdiam diri, adakah saya bersedia untuk menyabitkannya atas keseluruhan keterangan yang dikemukakan oleh pihak pendakwaan? Mahkamah berpendapat bahawa tanpa bukti rakaman CCTV, jawapan kepada soalan adalah jelas dan nyata tidak (lihat perenggan 65).

(3) Pihak pendakwaan gagal untuk menimbulkan kes prima facie terhadap tertuduh atas dakwaan membunuh di bawah s 302 Kanun yang mana jika tidak dipatahkan atau tidak dijelaskan, akan menyebabkan penyabitannya. Tanpa bukti rakaman CCTV, mahkamah juga tidak dapat mendapati satu kes prima facie yang dibuktikan melalui apa-apa dakwaan lebih kecil (lihat perenggan 66).]

Notes

For a case on murder, see 4(2) *Mallal's Digest* (4th Ed, 2012 Reissue) para 1682.

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Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Ahmad Najib bin Aris v PP [2007] 2 MLJ 505; [2007] 2 CLJ 229, CA (refd)
Gnanasegaran a/l Pararajasingam v PP [1997] 3 MLJ 1; [1997] 4 CLJ 6, CA (refd)
Hanafi bin Mat Hassan v PP [2006] 4 MLJ 134; [2006] 3 CLJ 269, CA (refd)
Lau Chee Kai v PP [2011] 9 CLJ 619, CA (refd)
Looi Kow Chai & Anor v PP [2003] 2 MLJ 65; [2003] 1 CLJ 734, CA (refd)
Magendran a/l Mohan v PP [2011] 6 MLJ 1; [2011] 1 CLJ 805, FC (refd)
R v Goring [2011] All ER (D) 54 (Jan), CA (refd)
The People (at the Suit of The Director of Public Prosecutions), Prosecutor v Darren Larkin, Accused [2008] IECCA 138; [CCA No 129 of 2007] (refd)

Legislation referred to

Criminal Procedure Code s 180
Evidence Act 1950 ss 3, 90A, 90A(1), (2), (3), (4), (6)
Penal Code ss 300(c), 302

Viknesvaran a/l Purnshatman (Deputy Public Prosecutor, Attorney General's Chambers) for the prosecution.
Halim Ashgar Mohd Hilmi (Halim Ashgar) for the accused.

Amelia Tee Abdullah J:

DECISION

[1] The accused, Mohd Abdul Aziz bin Ibrahim (No KP 881221–49–5047), was charged for an offence of murder punishable under s 302 of the Penal Code. The charge against him reads as follows:

> Bahawa kamu pada 15/10/2011 jam lebih kurang 12.40 pagi di Restoran Shukran, Wisma Cahaya Suria, Jalan Tun Tan Chen Lock, di dalam daerah Dang Wangi, di dalam negeri Wilayah Persekutuan Kuala Lumpur telah melakukan bunuh dengan menyebabkan kematian terhadap seorang lelaki warganegara Myanmar bernama Bar Bar (No. UNHCR 354-07C00967) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

THE PROSECUTION'S CASE

[2] The prosecution called a total of 11 witnesses in support of its case. On 15 October 2011 at about 1am, Kpl Reno ak Igar ('PW8') from *cawangan kereta peronda* was on rounds with Kpl 116357 Manan at Jalan Pudu when he saw a group of people gathered by the side of Pudu Sentral. Upon approaching the group of people, he saw a man of indeterminate race lying on the road, seriously injured and covered with blood. PW8 admitted that he did not know

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how long the man had been lying there on the ground at the scene. The victim was dressed in a grey t-shirt with red and black stripes and blue jeans. An initial examination by PW8 revealed a UNHCR card (P9) in his left jeans pocket which identified the injured man as Bar Bar with UNHCR Card No 354–07C00967.

[3] At the time, PW8 noticed a man squatting beside the victim. He identified that man as the accused, Mohd Abdul Aziz bin Ibrahim. He arrested the accused based on information received from the public that the accused was involved in a fight with the deceased. The accused did not resist arrest.

[4] The accused was then wearing a blue t-shirt, blue LEVIS jeans and blue rubber slippers. Whilst PW8 saw blood on the clothes and slippers of the accused, he admitted that he did not know whose blood it was. He conducted a search on the body of the accused and found a pair of scissors in his right trouser's pocket. Apart from the scissors, nothing dangerous was found on the accused. He then contacted the Dang Wangi Control Centre to request for an ambulance as well as for forensics assistance at the scene.

[5] An ambulance arrived at the scene at 1.30am and the deceased was confirmed to have died by Mohamad Hasrun bin Mohd Nuran ('PW10'), the medical assistant from the Red Crescent Society.

[6] PW8 brought the accused back to the *balai* where he lodged THSL Report 34320/2011 (P10) and handed over the accused to the investigating officer, ASP Wan Aeidil bin Wan Abdullah. The date 12 October 2011 on the report was inaccurate and should read 15 October 2011.

[7] The court notes PW8's evidence that he is able to identify the accused in the video recording (P8 (CD)) taken from Restoran Shukran. He identified the accused as the person who was seen running in the CD recording, both from his clothes as well as from his face.

[8] The investigating officer ('the IO') in this case is ASP Wan Aeidil bin Wan Abdullah ('PW11'). He was informed by Dang Wangi Control Centre about the incident at about 1.30am on 15 October 2011. He rushed to the scene, met up with Kpl Reno (PW8) and was informed about the arrest of a man suspected to be involved in the incident.

[9] At the scene, ASP Wan Aeidil saw a man of uncertain race/nationality lying on the ground and covered with blood. He ascertained his identity as Bar Bar, a Myanmar national holding UNHCR Card No 354–07C00967 (P9).

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[10] At the scene, ASP Wan Aeidil was also informed by PW8 Kpl Reno about the arrest of the accused. The accused was then wearing a collarless blue t-shirt and jeans. Patches of blood were seen on the left shoulder area of his t-shirt. The accused appeared to be in a state of shock ('dalam keadaan tergamam'). According to the IO, he did not see any signs of injury on the accused.

[11] Initial investigations revealed that there was a fight in Restoran Shukran which was located about 50 meters from where the deceased had subsequently collapsed. ASP Wan Aeidil had proceeded to Restoran Shukran where he had met with the duty manager, Mohamed Farouk bin Sulaiman Ali ('PW5') at about 2.10am. He had requested to view the CCTV recording in the restaurant which captured the fight between the deceased and the accused.

[12] Evidence was led that the CCTV recording could be seen from three cameras, namely cameras 3, 4 and 6. Camera 4 is located at the front entrance of the restaurant and records the accused entering and leaving the restaurant. Camera 3 is located inside the restaurant and records the movements of the deceased retreating ('berundur') and the accused advancing and swinging his hands towards the deceased ('menghayunkan tangan dia ke arah si mati'). Camera 6 is also situated in the restaurant and records the act of the accused in stabbing at the neck of the deceased. It also records the struggle between them with the deceased holding a part of a chair to defend himself.

[13] At the scene, ASP Wan Aeidil (PW11) had directed police photographer, D/Kpl Mohd Azmi bin Talib ('PW2'), to record 12 photographs of the scene (P5(1)–(12)).

[14] ASP Wan Aeidil had also informed the court about the attendance of Cif Inspector Norazmi from the Unit Forensics IPK KL who had rendered assistance in collecting blood samples and various other items from the scene.

[15] Back at IPD, Kpl Reno ('PW8') had handed over the accused to the IO, PW11, who had directed the police photographer to take three photographs of the accused as well as his slippers (P5 (13)-(15)). He had also seized the clothes that the accused was wearing at that time, namely:

(a) a blue t-shirt bearing the label 'Big and Bank' (P14);

(b) a pair of Levis 501 jeans (P15); and

(c) a brown belt with a green scorpion buckle (P16).

He had also received a pair of blue slippers from forensics. The *Akuan Serah Menyerah Barang Kes* (P17) lists item 6 as a pair of blue slippers on which patches of blood is seen.

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[16] Apart from informing the Myanmar Embassy about the death of their national, the investigating officer had also attended the post mortem of the deceased. The post mortem was conducted on 16 October 2011 at Jabatan Forensik HKL by Dr Nurliza bt Abdullah ('PW9'). During the post-mortem, Kpl Murugasu a/l Palaniandy ('PW1') was directed to take 58 photographs at the post mortem (P4 (1)–(58). Following the post mortem, Dr Nurliza had informed that the cause of death was a fatal penetration wound to the neck.

[17] The investigating officer, ASP Wan Aeidil had testified that after the post mortem, he had received an envelope containing blood, nail clippings, urine, and scalp hair of the deceased which he had kept in the refrigerator before sending to the chemist. There were also items received from forensics which he had kept in his office as well as items which he himself had seized from the accused. Unfortunately, he had not sent any of these items to the Chemistry Department immediately for analysis. The reason given by him for this failure was that the refrigerator in his office had broken down as a result of an electrical failure on 18 October 2011. The items received from Dr Nurliza were only sent on 10 September 2012 after he received instructions to send them.

[18] In respect of the CCTV recording, the IO had testified that the CD was received from Encik Sulaiman Ali bin Hamid ('PW7') on 17 October 2011 in the form of a CDR on which was written 'Restoran Shukran' with the date (P8 (CD)). He had printed still pictures in order to ascertain the chronology of the incident. The chronology of events can be seen as follows:

(a) at 12.41.08, the deceased was seen entering the restaurant (camera 4);

(b) at 12.41.09, the accused was seen chasing the deceased (camera 4);

(c) at 12.41.13, the deceased is seen retreating backwards (camera 6);

(d) at 12.41.16, the deceased is attacked by the accused (camera 6);

(e) at 12.41.17, the accused is seen attacking the deceased and swinging his hands (camera 6);

(f) at 12.41.18, the deceased is seen retreating (camera 3);

(g) at 12.41.18, the deceased is seen being pushed towards a table. The accused is the aggressor (camera 3);

(h) *at 12.41.20, it can be seen that the accused is attacking using his left hand towards the right side of the deceased's neck. It can be observed that the floor of Restoran Shukran at this point in time is clean and white (camera 3);*

(i) *at 12.41.21, patches of blood is seen on the floor of the restaurant. The deceased is seen distancing himself from the accused (camera 3);*

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(j) at 12.41.27, the accused is seen swinging his right hand towards the deceased. One of the workers of Restoran Shukran attempts to pull the deceased away (camera 3);

(k) at 12.41.28, the accused is seen clutching some object in his left hand (camera 3);

(l) at 12.41.29, the deceased pushes at a restaurant employee and runs away (camera 6);

(m) at 12.41.31, the deceased runs and is chased by the accused from the rear (camera 6);

(n) at 12.41.33, the deceased runs out of Restoran Shukran. Patches of blood is seen along the entire length of the floor over which the deceased had passed (camera 4); and

(o) at 12.41.36, the deceased runs out of the restaurant and is chased by the accused (camera 4). (Emphasis added.)

[19] ASP Was Aeidil told the court that after viewing the CCTV recording, he had requested Sulaiman Ali bin Abdul Hamid (PW7) to introduce the technician who had installed the CCTV recording. PW7 is the owner of Restoran Shukran. The CCTV in his restaurant was installed by Encik Zaidi bin Hanapi ('PW4'). PW7 had called PW4 to come to the restaurant to retrieve the recordings and PW4 had done so. PW4 had given PW7 two copies of the CCTV recording in CD form which PW7 had in turn sent to the IO, ASP Wan Aeidil. ASP Wan Aeidil had also called Encik Zaidi bin Hanapi (PW4) to his office where they had viewed the CCTV recording together and PW4 had explained about the different cameras in Restoran Shukran and the locations of the different cameras.

[20] In court, Zaidi bin Hanapi (PW4) had testified as to his downloading of the video recording of the incident using the Wifi network in the restaurant. He had downloaded the data video from all eight cameras into his own laptop. After that he had viewed the recordings and found that out of the eight cameras, only three cameras had recordings of the fight and that five other cameras had not covered the fight at all. The cameras which had recordings of the fight were cameras 3, 4 and 6. Thereafter, PW4 had recorded the incident into a CRD on which he had written 'Shukran' and the date — 15 October 2011. He identified P8 (CD) as the CDR which he had recorded. He had only recorded the incident itself which had lasted only 1–2 minutes. He had then handed over the CDR to Encik Sulaiman Ali bin Hamid (PW7).

[21] Initially, the IO had not sent the CD which he received to forensics. However, upon being advised by the deputy public prosecutor, he had sent the CD to the Forensic Department on 1 April 2013. From 17 October 2011–1

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April 2013, a lapse of more than 17 months, he had kept the CD in a locked drawer in his office to which only he had held the key.

[22] The CD was sent to Insp Fazurah bt Mahzan ('PW3') at the forensics lab on 1 April 2013. PW3 is an analyst with the *seksyen makmal forensik*. She had carried out an analysis of the digital exh (P8 (CD)) which was sent to her by the investigating officer on 1 April 2013. From the *Borang* MF01, she was requested to produce still pictures in chronological order according to sequence and to enhance ('jelaskan') the images of the suspect and the victim.

[23] PW3 had testified as to her analysis. First, she had made a copy on which to carry out her analysis. She found three video files in the CD, namely cameras 3, 4 and 6. When playing the video recording, she had captured images from the recording which images she had then 'jelaskan dengan menggunakan perisian Forensik Video'.

[24] The CD which PW3 was given for analysis had already been edited by shortening the time of the video. From her analysis, the total length of time of the recording was about a minute in respect of each camera. She had prepared her report together with the still images (P7). The original CD and P7 were handed over to the IO on 2 April 2013.

[25] The ambulance medical assistant, Mohamad Hasrun bin Mohd Nuran ('PW10') had confirmed that the deceased had died at the scene. In the course of checking the deceased for a response, he had noticed a wound at the right side of the deceased's neck from which there was extensive bleeding. He did not notice any other injuries apart from the injury at the neck.

[26] A more detailed account as to the deceased's injuries would have come from Dr Nurliza bt Abdullah (PW9), the doctor who conducted the post mortem. She had tendered her curriculum vitae (P11) which had set out her qualifications and experience. The court has no hesitation in accepting her as an expert in this case.

[27] On 16 October 2011 at about 10.20am, PW9 had carried out a post mortem examination on the deceased named Bar Bar bearing UNHCR ID No 354–07C00967. Following the post mortem, she had prepared a post mortem report (P12). Whilst PW9 had set out details of 19 external marks of trauma that were seen on the body of the deceased, some of which quite superficial, she had testified that the fatal wound would be injury No 10, namely:

> 10. Penetrating wound with ragged edges, 2.5 x 1 cm, with marginal bruising at its upper end, right anterolateral aspect of upper neck. The wound was directed from right to left and acutely angled downwards with a depth of 6 cm.

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At p 4 of her post mortem report, she had described her internal examination in relation to the area of the deceased's neck as follows:

> There were extensive haematomas in an area of 17x12 cm involving the right strap muscles of neck which extended to the retropharyngeal area. The right stern mastoid muscle and pharyngeal muscle showed extensive contusions associated with a *punctured wound at the mid-lateral aspect which had also punctured the right common carotid artery* and entering its lumen (corresponding to the penetrating wound (10). (Emphasis added.)

[28] PW9 was of the considered view that this penetrating wound would have been caused by a pointed, narrow and penetrating ('tirus, meruncing dan berciri tusukan') object such as a screw-driver, a piece of wood or metal with a pointed end. She emphasised that the narrow and pointed end *sans* handle should be more than 6cm in length. Because of the 'ragged edges' of the injury, the tip of the object was not very sharp ('tidak sangat tajam'). She was of the view that the object was not something that was sharp such as a knife or a blade but that it was more towards something pointed which would have caused the ragged or uneven edges.

[29] When queried as to whether car keys could have caused injury No 10, PW9's answer was that she would have to look at the car key in question. When shown defence counsel's Peugeot key, she was of the view that although the key was narrow ('tirus'), its end was not pointed ('hujungnya tidak runcing'). Further, that portion which was narrow up to the un-pointed end was only about 4cm in length. Thus she was of the view that it was not possible for such a key to have caused injury No 10 in this case. Even when shown the car key of the learned deputy, she was of the view that since the length of the metal portion of the key was only 4.8cm, that fact and the fact that the key was also not pointed led her to conclude that a key such as the one shown to her could not possibly have caused injury No 10.

[30] When asked whether injury No 10 could have caused immediate death, her response was that the injury would have caused rapid death ('kematian yang cepat'). Such an injury would have resulted in death within half an hour or less.

[31] She gave the following explanation as to what would have happened when such an injury was sustained:

> Penetrating wound of the neck *sedemikian yang menembusi saluran darah utama bahagian leher* (common carotid artery) *akan menyebabkan perdarahan yang banyak. la boleh membeku dan compress bahagian salur darah dan urat saraf pada bahagian leher di mana urat saraf pada bahagian leher mengawal electrical process pada jantung. Dan compression kepada urat saraf boleh menyebabkan reflex cardiac arrest iaitu terhenti denyutan secara reflex.*

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[32] Dr Nurliza was cross-examined at length as regards injury No 10. She confirmed that the wound was directed from the right to the left and acutely angled downwards with a depth of 6cm. She was unable to say if the injury came from the front or the rear or even the right side of the deceased. The court records the following exchange in relation to the possible fronts of attack:

PUT: Sekiranya serangan datang dari belakang, penyerang menggunakan tangan kanan.

ANS: Kemungkinan.

PUT: Jika serangan dari sisi, penyerang guna tangan kanan.

ANS: Kemungkinan ada.

[33] In re-examination, it was put to her by the learned deputy that if the assailant was attacking from the front, he would be attacking using his left hand. To which, her reply was that it was possible.

[34] The investigating officer, ASP Wan Aeidil, testified that from his investigations, the cause of death of the deceased is a stab wound to the right side of his neck by an object which is tapered. According to him, the CCTV recording shows that the stab to the deceased's neck occurred at 12.41.20. After being stabbed, the deceased had run out of Restoran Shukran to avoid further attack. He had fallen to the ground about 50 meters from Restoran Shukran. The accused had approached the deceased, shocked over seeing so much blood, and had remained on scene until Kpl Reno, who was on rounds, had stopped and arrested the accused.

[35] During cross-examination, PW11 agreed that in this case, his investigations were based solely on the CCTV recording. He agreed that in the CCTV recording, there was an image of another person who was dressed in dark clothing, and was at various times seen being held by the restaurant workers and also seen chasing the deceased. He agreed that this person named Braj was a friend of the accused. The police had been unable to trace this Braj.

[36] PW11 agreed that apart from what was seen on the CCTV recording, he was unable to state what else had happened. He agreed that he was not able to ascertain what had happened between 12.41.37 and the time when the deceased was found lying on the road. However, he disagreed that it was Braj who had stabbed the deceased on the neck. He disagreed that whilst chasing the deceased, Braj had stabbed the right side of the deceased's neck using his right hand. He further disagreed that Braj had run away because it was he who had stabbed the deceased. He also disagreed that the police had not recovered the

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murder weapon because Braj had taken it along with him. Information about Braj came from the accused and from that information; Braj was a homeless person with no permanent address.

[37] PW11 was also questioned as regards the personal circumstances of the accused. He agreed that from his investigations, the accused was unemployed, a homeless person and a vagabond, who lived below the bridge at the Klang bus stand. He agreed that the accused had no driving licence and that no car key was seized from him at the scene of the incident.

[38] PW11 agreed that Kpl Reno had arrived at the scene at about 1am whereupon he had arrested the accused. He agreed that looking at the last image captured on CCTV at 12.41.37, Kpl Reno would have arrived about 20 minutes after that recording but that the accused had not run away although he could have done so.

[39] The prosecution had called an employee of Restoran Shukran who was present in the restaurant at the time of the incident. He is Murugan a/l Raman ('PW6'), a *roti canai* maker at the restaurant. On 15 October 2011 at about 12 midnight, he was making *roti canai* in the restaurant when three men entered fighting. The men were fighting from the outside of the restaurant and into the restaurant. He described the method of fighting as 'pukul satu sama lain'. PW6 did not notice the men using any object when they were hitting each other. It was only after they had gone out of the restaurant that he noticed that there was blood on the floor of the restaurant. There was no blood on the floor before the fight. He did not know where the blood had come from and he did not see who was injured.

[40] PW6 did not know the three men who were fighting in the restaurant. He had had never seen them before that day. He claimed that even if he were shown the video recording, he would be unable to show who were the employees of the restaurant and who were the three men who were fighting. As such, he was not shown the CCTV recording.

THE COURT'S FINDINGS AT THE CLOSE OF THE PROSECUTION CASE

[41] At the close of the prosecution case, the court has carefully perused the evidence adduced by the prosecution through its 11 witnesses, examined the documentary evidence and reviewed the video recording tendered in support of its case. Section 180 of the Criminal Procedure Code which sets out the procedure to be followed at the conclusion of the prosecution's case reads as follows:

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180 (1) When the case for the prosecution is concluded, the Court shall consider whether the prosecution has made out a prima facie case against the accused.

(2) If the Court finds that the prosecution has not made out a prima facie case against the accused, the Court shall record an order of acquittal.

(3) If the Court finds a prima facie case has been made out against the accused on the offence charged the Court shall call upon the accused to enter on his defence.

(4) For the purpose of this section, a prima facie case is made out against the accused where the prosecution has adduced credible evidence proving each ingredient of the offence which if unrebutted or unexplained would warrant a conviction.

[42] What is a prima facie case has been clearly spelt out in the Court of Appeal case of *Looi Kow Chai & Anor v Public Prosecutor* [2003] 2 MLJ 65; [2003] 1 CLJ 734 where at p 67 (MLJ); p 749 (CLJ), Gopal Seri Ram JCA had held as follows:

[3] Under s 180 of the Criminal Procedure Code (Revised 1999), the duty of a judge, sitting alone, at the close of the case for the prosecution, is to determine, as a trier of fact, whether the prosecution has made out a prima facie case against the accused. The judge has only one exercise to undertake; he must subject the evidence of the prosecution to a *maximum evaluation* and then ask himself this question: If I decide to call the accused to enter on his defence, and he elects to *remain silent*, am I prepared to convict him on the totality of the evidence contained in the prosecution's case? If the answer is in the negative, then no prima facie case has been made out, and the accused is entitled to an acquittal (subjecting the prosecution's evidence to a maximum evaluation to determine if the defence is to be called does not mean that the prosecution has to prove its case beyond a reasonable doubt at that intermediate stage).

[3a] Consequently, a judge is *not* to undertake an initial minimum evaluation of the prosecution's evidence (followed by a maximum evaluation if the accused elects to remain silent) under s 180 of the Criminal Procedure Code (Revised 1999). (Emphasis added.)

[43] The case of *Looi Kow Chai & Anor* was referred to in the more recent Federal Court case of *Magendran a/l Mohan v Public Prosecutor* [2011] 6 MLJ 1; [2011] 1 CLJ 805 where at p 16 (MLJ); p 824 (CLJ), His Lordship Alauddin Mohd Sheriff PCA had found as follows:

The test at the end of the prosecution's case is 'prima facie case' based on a maximum evaluation of evidence. The evidence has to be scrutinised properly and not perfunctorily, cursorily or superficially. If the evaluation of the evidence results in doubts in the prosecution's case, then a prima facie case has not been made out. The defence ought not to be called merely to clear or clarify such doubts.

[44] The prosecution here is basing its case under cl (c) of s 300 of the Penal Code, namely that the act done by the accused was done with the intention of

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causing bodily injury to the deceased, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this case, the prosecution's case rests essentially on the following evidence:

(a) the CCTV recording of the incident as captured by the CCTV cameras located in Restoran Shukran which shows the fight between the accused and the deceased in the restaurant. The deceased is seen being chased into the restaurant and then out of the restaurant. The accused is seen in the video recording as the aggressor with the deceased taking a defensive stance. The recording at 12.41.20 from camera 3 shows the accused attacking using his left hand towards the right side of the deceased's neck. At this point in time, the floor of the restaurant is clean and white. However, at 12.41.21, only a second later, patches of blood can be seen on the floor of the *restoran*, signifying that the deceased had sustained the fatal injury at this stage;

(b) evidence of D/Kpl Reno ak Igar (PW8) as to his arrival at the scene at about 1am. where he found the deceased lying on the road and covered with blood and the accused squatting beside the deceased. He had arrested the accused based on information received from the public that the accused was involved in a fight with the deceased; and

(c) evidence of Dr Nurliza bt Abdullah (PW9) who conducted the post mortem on the deceased to the effect that the cause of death was a 'Fatal Penetrating Wound to the Neck'. The prosecution relies on her evidence that there was a punctured wound at the mid-lateral aspect which had also punctured the right common carotid artery. This injury would have caused rapid death ('kematian yang cepat') and death would have resulted within half an hour or less.

[45] The learned deputy public prosecutor had valiantly submitted that notwithstanding the absence of forensic evidence in this case, the evidence of the CCTV recording and the evidence of the other prosecution witnesses were sufficient to make out a prima facie case against the accused under s 302 of the Penal Code.

[46] Before me, learned counsel for the accused has submitted that a prima facie case has not been made out. He bases his submission on two broad grounds, namely:

(a) that the CD (P8 (CD)) containing the CCTV recording is inadmissible in law; and

(b) that the prosecution had failed to prove the ingredients of the charge against the accused.

[47] The word 'document' is defined in s 3 of the Evidence Act 1950 as

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follows:

> 'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever, by means of
>
> (a) ... ;
>
> (b) any visual recording (whether of still or moving images);
>
> (c) ... ;
>
> (d) ... ;
>
> or by more than one of the means mentioned in paragraphs (a), (b), (c) and (d), intended to be used or which may be used for the purpose of expressing, describing, or however representing, that matter.

As such, the CCTV recording that was downloaded by PW4 into P8 (CD) via his computer is a disc which falls within the definition of 'document' in s 3.

[48] Learned counsel for the accused has referred the court to the case of *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800 in his argument that since no certificate under s 90A of the Evidence Act 1950 was tendered in court by PW4, and neither did he orally testify that P8 (CD) was produced in accordance with s 90A(2) of the Act, it follows therefrom that P8 (CD) would be inadmissible in law. And since the prosecution is relying on the evidence of the CCTV recording, it follows therefrom that if P8 (CD) is inadmissible, then all the evidence adduced by the prosecution's witnesses in relation to P8 (CD) would also be inadmissible and as such the prosecution's case would collapse entirely.

[49] Thus learned counsel submits that whilst the prosecution may have established that the deceased Bar Bar had indeed died on 15 October 2011, however the other ingredients of the charge against the accused, namely:

(a) that the death of the deceased was caused by the act of the accused; and

(b) that the act of the accused was done with the intention to cause bodily injury to the deceased, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death,

have not been successfully established by the prosecution. Without the evidence of P8 (CD), all that would be left is the evidence of Murugan ('PW6') who could not even say who were the three persons who were fighting on the day in question and Kpl Reno (PW8) who saw the accused squatting beside the deceased and arrested him based on information obtained from the public that the accused was involved in the fight with the deceased. The identity of the members of the public from whom information as to the accused's involvement was obtained is unknown.

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[50] In response, the learned deputy public prosecutor concedes that P8 (CD) which contains the CCTV recording is a document. He further agrees that s 90A of the Evidence Act 1950 ('the Act') must be complied with. Upon a careful perusal of s 90A of the Act, the court notes that sub-s (1) allows the production of computer-generated documents if there is evidence:

(a) that they were produced by a computer; and

(b) that the computer is in the course of its ordinary use.

[51] The learned deputy has submitted that a certificate under s 90A(2) of the Act is not the only method to prove that a document is produced by a computer 'in the course of its ordinary use'. The Federal Court in *Ahmad Najib Aris*'s case had referred to the case of *Gnanasegaran a/l Pararajasingam v Public Prosecutor* [1997] 3 MLJ 1; [1997] 4 CLJ 6 where Shaik Daud JCA had held that:

> ... a certificate is not required to be produced in every case. It is our view that once the prosecution adduced evidence through a bank officer that the document is produced by a computer, it is not incumbent upon them to also produce a certificate under sub-s (2) as sub-s (6) provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use.

[52] The court notes that the learned deputy had dealt at length with the issue of whether the sole evidence of a CCTV recording could be sufficient to establish a prima facie case. A number of authorities of foreign jurisdictions have been cited (*The People (at the suit of The Director of Public Prosecutions)*, *Prosecutor v Darren Larkin, Accused* [2008] IECCA 138; [CCA No 129 of 2007]; *R v Goring* [2011] All ER (D) 54 (Jan)) in support of his submission that video evidence could be used to assist the court in assessing the totality of the prosecution case. However, in his written submissions, the learned deputy has failed to address the court on the issue of the admissibility of the CCTV recording in the context of the provisions of s 90A of the Evidence Act 1950.

[53] However, before me, the learned deputy has submitted that P8 (CD) as well as the report and the still pictures (P7) that were developed from P8 (CD) should be held to be admissible by the court. In referring to the case of *Ahmad Najib Aris* where the Federal Court had held that the CCTV tapes in that case had not satisfied the requirements of s 90A and were thus inadmissible as evidence, the learned deputy had lamented that the Federal Court had not given a detailed explanation as to why and in what manner the CCTV tapes had not satisfied the requirements of the Act.

[54] The learned deputy had urged the court to look at the decision of *Ahmad Najib bin Aris v Public Prosecutor* [2007] 2 MLJ 505; [2007] 2 CLJ 229 at the Court of Appeal stage where the court had dealt at length with the

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dilemma between s 90A(2) and 90A(6). He had also referred the Court to *Lau Chee Kai v Public Prosecutor* [2011] 9 CLJ 619 where the Court of Appeal had considered the admissibility of exh P71. Exhibit P71 is a printed copy of the serial numbers of the currency notes which were keyed into the computer by PW16 who had typed the said serial numbers based on exh P12, which is five volumes of photostated copies of the currency notes bound into volumes. In that case, the prosecution had not tendered a certificate under s 90A(2) of the Evidence Act 1950 and neither did PW16 say whether exh P71 was produced by a computer in the course of its ordinary use. There the Court of Appeal held that:

> ... by proving that exh P71 was produced by a computer the prosecution, in view of the authorities cited earlier, could resort to the presumption under s 90A(6) which provides that a document produced by a computer shall be deemed to be produced by the computer in the course of its ordinary use. We are of the view that exh P71 was rightly admitted in evidence by the learned trial judge.

[55] The court has carefully perused the authorities submitted and the arguments advanced by both sides. At the very centre of this dilemma is the CCTV recording (P8 (CD)) and the report and still pictures (P7) that was prepared by PW3 based on P8 (CD). The admissibility of P8 (CD) is thus of paramount importance in determining whether the prosecution has succeeded in establishing a prima facie case against the accused.

[56] Whilst the court has carefully considered and analysed the Court of Appeal decisions in *Ahmad Najib Aris* and *Lau Chee Kai*, it cannot be denied that the pronouncement of the highest court in the land on this issue is the 2009 Federal Court decision in *Ahmad Najib Aris*. In that case, the Federal Court was considering the admissibility of a CCTV tape which is similar to the facts of our instant case. This is quite unlike the case of *Lau Chee Kai* where the item in question was a printed copy of serial numbers of currency notes which had been keyed into the computer by PW16.

[57] So, what had the Federal Court decided on this issue? At p 826, the Federal Court had referred to the distinction between the applicability of ss 90A(2) and 90A(6) which had been addressed by Augustine Paul JCA in the case of *Hanafi bin Mat Hassan v Public Prosecutor* [2006] 4 MLJ 134; [2006] 3 CLJ 269. At pp 151–152 (MLJ); pp 301–302 (CLJ), His Lordship had stated as follows:

> ... in order for a document produced by a computer to be admitted in evidence it must have been produced by the computer in the course of its ordinary use. It is therefore a condition precedent to be established before such a document can be admitted in evidence under s 90A(1). The manner of establishing this condition has been prescribed. It can be proved by tendering in evidence a certificate as stipulated by s 90A(2) read with 90A(3). Once the certificate is tendered in evidence the

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> presumption contained in s 90A(4) is activated to establish that the computer referred to in the certificate was in good working order and was operating properly in all respects ...
>
> ... However, the use of the words 'may be proved' in s 90A(2) indicates that the tendering of a certificate is not a mandatory requirement in all cases ...
>
> ... the use of the certificate can be substituted with oral evidence as demonstrated in *R v Shepherd* [1993] 1 All ER 225 in dealing with a provision of law similar to s 90A. Needless to say, such oral evidence must have the same effect as in the case of the use of a certificate. It follows that where oral evidence is adduced to establish the requirements of s 90A in lieu of the certificate the presumption attached to it, in particular, the matters presumed under s 90A(4) must also be proved by oral evidence ...

[58] From the above recounting of the provisions of s 90A(1)–(4) and how they would apply, it would be clear, as succinctly stated by Augustine Paul JCA that the condition precedent in s 90A(1) together with the stipulation on the manner of its proof makes it unmistakeably clear that a document made admissible by the section is only one which was produced by a computer in the ordinary course of its use.

[59] If so, what then is the position as regards s 90A(6). Section 90A(6) is a deeming provision which deems a document produced by a computer to have been produced by the computer in the course of its ordinary use. The court is in full agreement that s 90A(2) and 90A(6) are incompatible. As stated by His Lordship Augustine Paul in that case:

> A fact cannot be deemed to have been proved which specific provision has been made for the mode of proof of the same fact. If therefore s 90A(6) is to function as a substitute for the certificate it will render nugatory s 90A(2). This will not accord with the basic rules of statutory construction.

[60] It would appear that there was an attempt to reconcile the two subsections to prevent a conflict between them. The conclusion was that s 90A(6) would only apply to a document which was not produced by a computer in the ordinary course of its use or, in other words, to a document which does not come within the scope of s 90A(1). It cannot apply to a document which is already one that is produced by a computer in the ordinary course of its use.

[61] The Federal Court in *Ahmad Najib Aris* had agreed with Augustine Paul JCA's views as stated above. In essence, the Federal Court found that the fact that a document was produced by a computer in the course of its ordinary use may be proved by tendering in evidence a certificate under s 90A(2) *OR* by way of oral evidence. Such oral evidence must consist not only of a statement that the document was produced by a computer in the course of its ordinary use but

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also the matters presumed under s 90A(4).

[62] In this case, as in the case of *Ahmad Najib Aris*, no certificate was tendered for proof of the CCTV recording. Neither was there any oral evidence adduced from PW4, Zaidi bin Hanapi, to show that the CCTV recording was produced by a computer in the course of its ordinary use. In the absence in both of the certificate as well as the oral evidence as aforesaid, it follows therefrom that the CCTV recording is inadmissible for non-compliance with s 90A of the Evidence Act 1950.

[63] In this case, the prosecution's case rests primarily on the CCTV recording from Restoran Shukran. The court is not saying that in an appropriate case where a CCTV recording clearly captures the commission of an offence and the identity of the perpetrator can clearly be identified, that there cannot be a finding of a prima facie case based solely on a CCTV recording. However, it cannot be gainsaid that the evidence of such CCTV recording must be admissible in the first place. Since the court has found the CCTV recording P8 (CD) to be inadmissible, it follows therefrom that P7 would also be inadmissible as PW3 had based both her report as well as the still photographs in it on the CCTV recording.

[64] The court finds that without the evidence of the CCTV recording, the prosecution has failed to establish that it was the accused who had caused the death of the deceased. Faced with this failure, there is no necessity for the court to consider whether the act done was done with the intention to cause bodily injury to the deceased, and whether the bodily injury was sufficient in the ordinary course of nature to cause death.

CONCLUSION

[65] Thus, at the close of the prosecution case, after considering the totality of the evidence adduced, the court has to ask itself this question: If I call on the accused to enter upon his defence and he elects to remain silent, am I prepared to convict him on the totality of the evidence adduced by the prosecution? The court is of the considered view that without the evidence of the CCTV recording, the answer to the question is a loud and resounding *NO*.

[66] In the circumstances, the court finds that the prosecution has failed to make out a prima facie case against the accused on the charge of murder under s 302 of the Penal Code which if unrebutted or unexplained would have warranted his conviction. Without the evidence of the CCTV recording, the court is also unable to find a prima facie case made out on any lesser charge. Accordingly, the court herewith acquits and discharges the accused without calling for his defence.

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A *Accused acquitted and discharged without calling to enter defence.*

Reported by Afiq Mohamad Noor

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